Supreme Court, U.S.
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No.
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IN THE

Supreme Court of the United States

CHIEF MASTER SERGEANT BOBBY HIBBARD,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant is entitled to request and receive an instruction on an alternate defense theory raised by the evidence even though that alternate theory may be inconsistent with the primary defense theory argued at trial.

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Petitioner, Chief Master Sergeant Bobby Hibbard, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on February 6, 2003.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Hibbard,* 58 M.J. 71 (2003), is located at Appendix A, 1a-13a. The unpublished opinion of the United States Air Force Court of Criminal Appeals, *United States v. Hibbard*, ACM 34371, 2001 CCA LEXIS 304 (A.F. Ct. Crim. App. November 29, 2001), is located at Appendix B, 14a-24a.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on February 6, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution states that "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;

to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

This case presents the question of whether a defendant charged with rape is entitled to an instruction on mistake of fact as to the complaining witness's consent even though the defendant's primary theory at trial was that defendant and the complaining witness had no sexual contact. The defense counsel requested a mistake-of-fact instruction after the testimony of the complaining witness raised the issue of her consent to sexual intercourse.

The Court of Appeals for the Armed Forces–relying on the failure of the defense to use a "mistake of fact approach"–concluded that a mistake-of-fact instruction was not required. By relying on the primary defense theory of the case in this analysis, the Court of Appeals for the Armed Forces essentially ruled that petitioner could not raise inconsistent defenses. This holding violates petitioner's right to present a defense. This Court has recognized that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 61 (1988) (*citing Stevenson v. United States*, 162 U.S. 313 (1896)). This principle applies even in circumstances where the defenses raised by the evidence may be inconsistent. *Mathews*, 485 U.S. at 63.

Moreover, the holding by the Court of Appeals for the Armed Forces, requiring the defense to use a "mistake of fact approach," impermissibly burdened petitioner's presumption of innocence and his right to have effective assistance of counsel because petitioner was also charged with falsely denying that he had any sexual contact with the complaining witness, a charge to which he pled "not guilty."

1. **Facts**

Petitioner, Chief Master Sergeant Bobby Hibbard, was tried by General Court-Martial and found guilty of rape in 2000. He was also convicted of making a false official statement when he told investigators, "I deny any sexual contact with [Technical Sergeant Lilly Warner]."[1] App. B, *infra*, 19a.

Petitioner *did not* testify at trial. The evidence on the charge of rape relied predominantly on the testimony of Sergeant Warner. The prosecution also presented the testimony of an investigative agent who testified that petitioner, when questioned, denied having any sexual contact with Sergeant Warner. The events underlying the charge occurred at an Air Force installation in the Kingdom of Saudi Arabia. Both petitioner and Sergeant Warner were married and away from their respective families at the time. App. B, *infra,* 16a.

According to the testimony of Sergeant Warner, within a couple of days after arriving in Saudi Arabia, she agreed to go with petitioner to a base swimming pool at night. They arrived at the private pool together at approximately 8:30 in the evening. For a little over an hour, they alternated between the swimming pool and hot tub. App. B, *infra,* 16a.

While they were in the hot tub the second time, Chief Hibbard picked up Sergeant Warner's feet and began to rub them. Sergeant Warner said nothing in response. He also asked her if she trusted him. She said, "yes." App. B, *infra,* 17a. Then, according to Sergeant Warner's testimony, petitioner stood up, came over to her, and began touching her body all over. Sergeant Warner said nothing in response to petitioner's activities. Sergeant Warner testified that Chief Hibbard then placed his hand inside her swimsuit and placed his finger inside her vagina. App. B, *infra,* 17a.

Sergeant Warner next testified that Chief Hibbard laid a towel down beside the hot tub, and he and Sergeant Warner

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[1] Chief Hibbard was convicted of other offenses that are not implicated in this petition.

lay down together upon the towel. Sergeant Warner did not remember how she got out of the hot tub. App. B, *infra,* 17a. Additionally, Sergeant Warner thought she said, "I can't do this," but was unsure whether she said this out loud or just to herself. App. B, *infra,* 17a. Sergeant Warner testified that petitioner then pulled his swimming trunks down and lay on top of her. He tried to kiss her, but she moved her head away. App. B, *infra,* 17a. He then placed his penis inside of her vagina. Sergeant Warner testified that she was breathing hard and started crying. App. B, *infra*, 17a. According to Sergeant Warner, Chief Hibbard asked her if she wanted him to stop, but she did not reply, only nodding her head. Sergeant Warner admitted on cross-examination that he might not have seen her nod. She began to breathe and cry harder. Again, Chief Hibbard asked her if she wanted him to stop. She responded with a "whimper," but then said, "yes." Petitioner immediately stopped having sexual intercourse with Sergeant Warner. App. B, *infra,* 17a.

After he stopped, petitioner and Sergeant Warner had a brief conversation in which petitioner told Sergeant Warner that she was a beautiful woman and that she should let "what comes naturally happen." App. B, *infra,* 17a, 18a. He also said, "well, at least this was consensual." App. B, *infra,* 18a.

At trial, the defense counsel asked the military judge to instruct the court members on the defense of mistake of fact as to whether the alleged acts between Chief Hibbard and Sergeant Warner were consensual. The defense counsel relied on Sergeant Warner's testimony for his request, pointing out that she equivocated in her testimony on whether she ever said "no" to sexual intercourse and that, according to Sergeant Warner's testimony, at the point she clearly communicated her desire to stop intercourse, petitioner immediately stopped. Trial Rec. 654-55.

The military judge denied the request, citing the testimony of Sergeant Warner as well as the evidence that petitioner had denied engaging in sexual intercourse in his statement to the investigator. The military judge further

noted that such a mistake of fact needed to be both "honest" (subjective) and "reasonable" (objective). Because petitioner did not testify at trial and the defense theory of the case was "blanket denials of any kind of contact whatsoever" (App. A, *infra,* 8a), the military judge reasoned that there was no evidence for the court members to consider that demonstrated a subjective or honest mistake. App. B, *infra,* 20a.

2. Proceedings Below

The Air Force Court of Criminal Appeals understood the defense's dilemma in this case. "The defense was in a difficult position at trial. The appellant was charged with both rape and making a false official statement to law enforcement agents by denying 'any sexual contact with' [Sergeant Warner]. He could not very well advance a mistake-of-fact defense to the rape without conceding that his statement to law enforcement agents was false." App. B, *infra,* 19a. The Air Force Court then found that Sergeant Warner's testimony that petitioner had said, "well, at least it was consensual," was some evidence to which court members could attach credit on the element of whether the mistake of fact was honest. App. B, *infra,* 20a. Nonetheless, the Air Force Court concluded that there was no evidence of objective circumstances raising the mistake-of-fact defense. App. B, *infra,* 20a.

The Court of Appeals for the Armed Forces also focused on the objective element of the test. The Court noted that in deciding whether a mistake-of-fact instruction was required, the court takes into account "the manner in which the issue was litigated as well as the material introduced into evidence at trial." App. A, *infra,* 11a. The Court of Appeals noted that the defense counsel did not connect the evidence that petitioner had said "at least it was consensual" to his request for the mistake-of-fact instruction as well as the fact that defense counsel did not "seek through argument to suggest that the case involved sexual intercourse which petitioner believed to be consensual." App. A, *infra,* 12a. The Court

of Appeals stated that they could "take into account the absence of a mistake of fact approach from the defense case when considering [the] evidence." App. A, *infra,* 12a. The Court of Appeals concluded, "the evidence cited by the defense in light of the totality of circumstances, including the manner that the issue was litigated at trial, was insufficient to reasonably raise the issue of whether [petitioner] had a reasonable belief that [Sergeant Warner] consented to sexual intercourse." App. A, *infra,* 12a-13a.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Armed Forces is in conflict with the decision of this Honorable Court in *Mathews v. United States*, 485 U.S. 58 (1988). Further, the decision of the Court of Appeals for the Armed Forces is in conflict with the decisions of at least five circuit courts of appeals. The decision of the Court of Appeals for the Armed Forces conflicts with these cases because the decision precludes instruction on one legal defense merely because a criminal defendant also pursues a different, and potentially inconsistent, theory of the case in his or her defense.

The decision of the Court of Appeals that it could consider "the manner in which the case was litigated" at trial in determining whether the evidence raised the mistake-of-fact defense violates petitioner's right to present a defense as found in the holdings of this Honorable Court. It circumvents the notion that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews*, 485 U.S. at 63 (citing *Stevenson v. United States*, 162 U.S. 313 (1896)). This includes circumstances where the defenses raised by the evidence may be inconsistent. *Mathews*, 485 U.S. at 66. The Court of Appeals' holding also violates petitioner's presumption of innocence and his right to have effective representation by

counsel by essentially requiring the defense counsel to concede that petitioner made a false official statement when he denied all sexual contact with Sergeant Warner in order to assert that he may have been mistaken regarding her consent to sexual intercourse.

More than 100 years ago this Court held that "so long as there was some evidence upon the subject" of a defense, the jury must be instructed to decide on that defense. *Stevenson*, 162 U.S. at 314, 320. The "evidence need not be uncontradicted or in any way conclusive upon the question." *Id.* at 314.

In this case, Sergeant Warner's own testimony raised the issue of whether petitioner mistakenly believed that she had consented to sexual intercourse. Sergeant Warner admitted that she did not say "no" to the petitioner at any time and that petitioner did not use any force or threat of force. Trial Rec. 171, 214. She testified that it was petitioner who asked whether she wanted to stop having sexual intercourse and upon hearing that she wanted to stop, he did so immediately. Further, according to Sergeant Warner's testimony, immediately after the incident, petitioner said out loud that their encounter was consensual.

The Court of Appeals correctly noted "[a]n honest and reasonable mistake of fact as to the victim's lack of consent" is an affirmative defense to a charge of rape. App. A, *infra*, 3a (citations omitted). In deciding whether the evidence in this case raised the issue of petitioner's mistake of fact as to whether Sergeant Warner consented to sexual intercourse, the Court of Appeals looked at the evidence but did so only through the prism of the defense's presentation of the case. The Court further observed: petitioner's counsel did not *"seek through argument to suggest that the case involved sexual intercourse which petitioner believed to be consensual."* The Court focused extensively on the defense's presentation of the case, discussing the defense's

opening statement, closing argument,[2] and cross-examination of Sergeant Warner. It is axiomatic that neither the defense counsel's statements, whether in opening or summation, nor counsel's questions to witnesses are evidence in the case. The Court of Appeals violated this elemental principle by focusing extensively on counsel's conduct in evaluating the evidence in this case. *See United States v. Valencia*, 669 F.2d 37 (2d Cir. 1980) (counsel's closing argument that defendant was not involved in drug transaction did not preclude the assertion of dual defenses of non-involvement and entrapment). *Compare United States v. Durham*, 825 F.2d 716 (2d Cir. 1987) (defense counsel's summation not adequate to inform a jury of what it should consider as a legally valid defense).

The Court of Appeals for the Armed Forces further erred in determining that the defense cross-examination of Sergeant Warner did not raise mistake of fact as to her consent to sexual intercourse. Defense counsel's cross-examination brought out many factors supporting the mistake-of-fact defense. The defense counsel focused on inconsistencies in Sergeant Warner's various pretrial statements. Counsel obtained her admissions that she never said "no" during the encounter and that petitioner did not use force or a threat of force during the incident. Trial Rec. 171, 214. Moreover, upon defense counsel's cross-examination, Sergeant Warner admitted that she did not describe the incident as "rape" until that label was suggested by an Air Force lawyer. Trial Rec. 207.

The Court of Appeals' holding, by focusing on the defense theory of the case that petitioner and Sergeant Warner did not engage in sexual intercourse to determine whether the evidence raised a mistake of fact as to Sergeant Warner's consent, prevented petitioner from raising the

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[2] Counsel's closing argument occurred *after* the military judge denied the defense request for a mistake-of-fact instruction. Any argument regarding mistake of fact was effectively foreclosed when the military judge refused to give the instruction.

alternate defenses: 1) that he did not have sexual intercourse with Sergeant Warner; but 2) if he did, Sergeant Warner's own testimony established that he mistakenly believed that she had consented. This Honorable Court has recognized that a defendant may present inconsistent defenses. *Mathews*, 485 U.S. at 66. In *Mathews*, this Court resolved a split in the circuits, holding that a defendant raising an entrapment defense need not admit to having participated in the underlying criminal act–even though entrapment presupposes the commission of a crime–before asserting that government officials induced the defendant to commit the crime. Significantly, in *Mathews,* this Honorable Court specifically observed that a defendant in a rape case is permitted to argue that the act did not take place and that the victim consented. *Id.* at 64 (citing *Johnson v. United States*, 426 F.2d 651, 656 (D.C. Cir. 1970)). Yet the holding of the Court of Appeals for the Armed Forces in this case–refusing to instruct on the mistake of fact because the principal defense in the case was that the act did not take place–precluded petitioner from doing so.

The decision by the Court of Appeals for the Armed Forces conflicts with the holdings of five circuit courts of appeal, recognizing the principle that a defendant is entitled to an instruction on all defenses raised by the evidence, even if those defenses are inconsistent. "It is well established that a criminal defendant may raise inconsistent defenses, and is entitled to an instruction on any defense or lesser included offense whenever there is evidence sufficient for a reasonable jury to find in her favor, even when the defense and lesser included offense are inconsistent with each other." *United States v. Browner*, 889 F.2d 549, 555 (5th Cir. 1989) (defendant entitled to jury instruction that she did not intend to stab her husband, and, in the alternative, that she stabbed him in self-defense). *See also United States v. Goldson,* 954 F.2d 51 (2d Cir. 1992) (defendant charged with assaulting a federal officer entitled to instruction that he did not know the victim was a federal official even though it was inconsistent

with his denial of throwing a brick at the officer); *Arcoren v. United States*, 939 F.2d 1235 (8th Cir. 1991) (defendant entitled to a jury instruction that he reasonably believed the victim was at least sixteen years old, and, in the alternative, that he had no sexual contact with her); *United States v. Pervez*, 871 F.2d 310 (3d Cir. 1989) (in reversing a conviction for entrapment, the court noted, "*Mathews* affords a defendant the substantial right to plead inconsistent defenses"); *Johnson v. United States*, 426 F.2d 651 (D.C. Cir. 1970) (defendant entitled to instruction that victim may have consented even though he argued that he had no sexual contact with victim).

The Court of Appeals' holding also violates petitioner's presumption of innocence and his right to have effective representation by counsel by requiring the defense counsel to essentially concede that petitioner made a false official statement denying all sexual contact with Sergeant Warner in order to assert that he may have been mistaken regarding her consent to sexual intercourse. *See generally United States v. Demma,* 523 F.2d 981 (9th Cir. 1975) (adherence to the rule that a defendant must admit participation in the underlying crime before raising an entrapment defense could create serious constitutional problems by conditioning assertion of a defense on the defendant's yielding three important rights: 1) his presumption of innocence; 2) his right to remain silent; and 3) his right to have the Government prove the elements of the crime beyond a reasonable doubt). This put the defense counsel in an impossible position. "Unquestionably, the constitutional right of a criminal defendant to plead 'not guilty,' or perhaps more accurately not to plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea." *Wiley v. Sowders*, 647 F.2d 642, 651 (6th Cir. 1981). Had the defense counsel in this case argued as the primary defense theory that the evidence supported a mistake of fact as to Sergeant Warner's consent, he would have run the risk of ineffectively representing the petitioner in his decision not to plead guilty

to the charge that he falsely denied all sexual contact with Sergeant Warner. As in *Mathews*, petitioner should have been allowed to pursue both his primary and alternate defense theories even though those theories were potentially inconsistent. The need for him to do so is constitutionally compelling in this case: had the defense counsel complied with the Court of Appeals' decision in order to raise the mistake-of-fact defense, counsel would have, for all intents and purposes, conceded petitioner's guilt as to another charge.

CONCLUSION

The Court of Appeals' decision in this case created a constitutional "Catch 22" for petitioner. By focusing on the defense theory of the case rather than the evidence presented at trial, the Court violated petitioner's right to present a defense and have the jury instructed on every defense raised by the evidence. This decision conflicts with this Honorable Court's decision in *Mathews* and the decisions of five circuit courts of appeals. Moreover, the import of the decision by the Court of Appeals for the Armed Forces was to require the defendant or his counsel to concede that he was guilty of a false official statement. Such requirement violated petitioner's presumption of innocence, his decision to plead not guilty, and his right to have effective representation by counsel. Petitioner therefore respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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May 2003

Appendix A

IN THE CASE OF

UNITED STATES, Appellee

v.

Bobby HIBBARD, Chief Master Sergeant
U.S. Air Force, Appellant

No. 02-0231

Crim. App. No. 34371

United States Court of Appeals for the Armed Forces

Argued November 5, 2002

Decided February 6, 2003

EFFRON, J., delivered the opinion of the Court, in which CRAWFORD, C.J., GIERKE, BAKER, and ERDMANN, JJ., joined.

Counsel

For Appellant: *Lieutenant Colonel Robin S. Wink* (argued); *Lieutenant Colonel Beverly B. Knott*, *Major Patricia A. McHugh*, and *Major Jeffrey A. Vires* (on brief).

For Appellee: *Lieutenant Colonel LeEllen Coacher* (argued); *Lieutenant Colonel Lance B. Sigmon* and *Major Jennifer R. Rider* (on brief).

Military Judge: Michael J. Rollinger

Judge EFFRON delivered the opinion of the Court.

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of one specification each of maltreatment, rape, indecent assault, and making a false official statement, and two specifications alleging dereliction of duty, in violation of Articles 93, 120, 134, 107 and 92, Uniform Code of Military Justice [hereinafter UCMJ] 10 USC §§ 893, 920, 934, 907, and 892 (2002), respectively. He was sentenced to confinement for four years and reduction to pay grade E-4. The convening authority approved the findings and approved a sentence of confinement for two years and reduction to pay grade E-4. The Court of Criminal Appeals affirmed in an unpublished opinion.

On Appellant's petition, we granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED IN REFUSING TO INSTRUCT THE MEMBERS ON THE DEFENSE OF MISTAKE OF FACT AS TO THE COMPLAINANT'S CONSENT AS RELATED TO THE OFFENSE OF RAPE IN THE SPECIFICATION OF CHARGE II.

For the reasons stated below, we hold that the military judge did not err when he declined to instruct the panel of members on the defense of mistake of fact.

I. BACKGROUND

A. The Mistake of Fact Defense

When an accused is charged with a crime in which knowledge or intent is material as to an element, "it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would be not guilty of the offense." Rule for Courts-Martial 916(j) [hereinafter R.C.M.]. If the accused is charged with a general intent offense such as rape, "the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances." Id.

Rape is a general intent offense requiring proof that an accused deliberately or purposefully committed an act of sexual intercourse by force and without the victim's consent. *See* Article 120(a); *Manual for Courts-Martial, United States* (2002 ed.) Part IV, para. 45.b.(1) [hereinafter *MCM*]; *United States v. Willis*, 41 M.J. 435, 437 (1995). "[A]n honest and reasonable mistake of fact as to the victim's lack of consent" is an affirmative defense to a charge of rape. *United States v. True*, 41 M.J. 424, 426 (1995)(quoting *United States v. Taylor*, 26 M.J. 127, 128 (C.M.A. 1988)).

The military judge is required to instruct the court-martial panel on the availability and legal requirements of an affirmative defense, if "the record contains some evidence to which the military jury may attach credit if it so desires." *United States v. Brown*, 43 M.J. 187, 189 (1995) (quoting *United States v. Simmelkjaer*, 18 C.M.A. 406, 410, 40 C.M.R. 118, 122 (1969)). *See* R.C.M. 920(e)(3); *United States v. Davis*, 53 M.J. 202, 205 (2000). An affirmative defense "may be raised by evidence presented by the defense, the prosecution, or the court-martial." R.C.M. 916(b) discussion.

The defense theory at trial and the nature of the evidence presented by the defense are factors that may be considered

in determining whether the accused is entitled to a mistake of fact instruction, but neither factor is dispositive. *See United States v. Jones*, 49 M.J. 85, 91 (1998); *Taylor*, 26 M.J. at 131. "Any doubt whether an instruction 'should be given should be resolved in favor of the accused.'" *Brown*, 43 M.J. at 189 (quoting *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981)).

B. Appellant's Trial

Appellant was prosecuted for a number of offenses, including a charge that he raped Technical Sergeant (TSgt) W while both were stationed in Saudi Arabia at Eskan Village. Appellant's defense at trial was that he did not engage in sexual intercourse with TSgt W.

1. Defense Counsel's Opening Statement

The central theme of defense counsel's opening statement was that Appellant did not engage in an act of sexual intercourse with TSgt W. In support of this approach, defense counsel suggested the evidence would show that TSgt W had fabricated the rape charge. According to defense counsel, TSgt W wanted a transfer from Saudi Arabia to the United States. The apparent implication was that she would receive more sympathetic consideration as a rape victim. Defense counsel indicated the evidence would show that TSgt W had not wanted to leave her family in Little Rock, Arkansas, where she had been stationed for sixteen years, and that she decided to accuse Appellant of rape after Staff Sergeant (SSgt) S told her about inappropriate sexual advances by Appellant. Defense counsel suggested the evidence would show that TSgt W's motive to fabricate and the lack of medical evidence would prove that no sexual intercourse occurred.

2. The Victim's Testimony

TSGT W was the prosecution's primary witness. She provided the following testimony about her interaction with Appellant –who was her first sergeant – in the brief period between her arrival at Eskan Village and the incident leading to the rape charge.

During the two days following her arrival, Appellant provided TSGT W with an orientation – showing her around the base, including her in social functions, and introducing her to other Air Force personnel. In the course of these activities, Appellant pointed out a private swimming pool, indicating that he was allowed to bring one guest to the pool. He told her not to tell anyone else about it.

In the afternoon of her third day at the base, Appellant called TSgt W into his office on four different occasions, asking her each time to accompany him to the private pool that night. Although TSgt W repeatedly attempted to avoid giving a direct answer, Appellant pressed her to join him, and she eventually agreed to do so. That evening, Appellant met TSgt W at her room, telling her that they would first go to his apartment so that he could change into his swimsuit. At the apartment, Appellant asked TSgt W to enter his room. Because she was reluctant to be alone with him, she declined to do so, and remained in the hallway while he changed.

When they arrived at the private pool, no one else was present. TSgt W hesitated because she did not want to be alone with Appellant, but she was also concerned about acting in a manner that would be perceived as insulting to her first sergeant. After Appellant prodded her, she eventually went into the pool area, and they both entered the pool. At the time she entered the pool, she was wearing shorts over her swimsuit. After the pockets filled with water, causing discomfort, she removed the shorts that covered her swimsuit. Over the period of about an hour, Appellant and

TSgt W swam and talked, spending time in both the pool and a nearby hot tub.

While in the hot tub, Appellant asked TSgt W if she trusted him. She replied that she did. He began to rub her feet. A few seconds later, Appellant let go of her feet, stood up, and "came at" her -- touching her breasts, buttocks, thighs, and back. After trying to kiss her, he pulled aside her swimsuit and inserted his finger into her vagina. According to TSgt W, this initial contact lasted "a couple of seconds," leaving her in shock, unable to move or speak.

Appellant then left the hot tub and spread out a towel on the deck. TSgt W told Appellant, "I can't do this." She next found herself on her back on the towel, but could not recall the details of moving from the hot tub to the towel. Appellant pulled down his swim trunks and "came down on [her] really fast," leaving her able to move only her upper chest area and head. She struggled to turn her head back and forth to avoid Appellant's attempts to kiss her, which led him to say, "come on, kiss me." Appellant then inserted his penis into TSgt W's vagina.

TSgt W, who began to cry "really hard," had difficulty breathing. Appellant asked TSgt W if she wanted him to stop, and she nodded an affirmative response. It is unclear whether he saw her response, but he did not stop. When she realized that he was not stopping, she began to cry "even harder." He again asked if she wanted him to stop, and TSgt W was able to say that she wanted him to stop. Appellant then ended the act of sexual intercourse.

After terminating the sexual activity, Appellant said: "You are a beautiful woman and we are both adults." He asked her to come back to his room with him. She refused. He said that he wanted to get to know her better, and that she should "just let what comes natural happen" next time. He

also said that she need not worry because he had undergone a vasectomy. As they were preparing to leave, he added: "Well, at least this was consensual."

3. Defense Counsel's Cross-Examination of the Victim

The cross-examination of TSgt W by defense counsel emphasized the defense contention that Appellant did not engage in sexual intercourse with TSgt W. Defense counsel highlighted inconsistencies between TSgt W's testimony at trial and prior statements she made to investigating authorities. In addition, defense counsel explored TSgt W's unhappiness with having to leave her family. Defense counsel did not ask any questions on cross-examination to explore or highlight a mistake of fact defense.

4. The Defense Case

The defense case on the merits sought to bolster the proposition that Appellant did not engage in sexual intercourse with TSgt W. Appellant did not seek to establish a mistake of fact defense. Defense counsel submitted twenty-three affidavits and multiple witnesses attesting to Appellant's good military character, his law-abiding nature, and his character for truthfulness. A fellow first sergeant testified that Appellant's public interaction with TSgt W was neither inappropriate or unusual. Defense counsel attempted to discredit SSgt S's allegations of inappropriate sexual advances by Appellant. Defense counsel also introduced evidence that a guard walked past Appellant and TSgt W while they were in the hot tub, and that they had exchanged greetings. Appellant did not testify, and the defense did not present any other evidence of a mistake of fact defense during its case-in-chief.

5. The Request for Instructions and Defense Counsel's Closing Argument

Prior to closing arguments, defense counsel moved for a mistake of fact instruction. Defense counsel's argument in favor of the instruction addressed TSgt W's remarks and actions towards Appellant, suggesting that the record was unclear as to whether TSgt W "communicated her non-desire" to Appellant. Defense counsel did not cite or rely upon that aspect of TSgt W's testimony stating that after the act was completed, Appellant said: "Well, at least this was consensual." Likewise, defense counsel did not contend that TSgt W affirmatively had indicated a desire to engage in sexual intercourse. The military judge denied the motion, taking note of TSgt W's testimony that Appellant had rushed toward her, pinned her down, left her in a state of shock, and did not ask if she wanted him to desist until after the act of penetration. The military judge, observing that the mistake of fact defense requires both an honest and a reasonable belief, held that there was not enough evidence to warrant an instruction. He specifically relied upon TSgt W's description of the incident and the defense theory of the case, which he described as "blanket denials of any kind of contact whatsoever[.]"

Defense counsel's closing argument concentrated on the defense theory that Appellant had not engaged in sexual intercourse with TSgt W. Counsel did not ask the members to consider that Appellant might have mistakenly believed that TSgt W consented to sexual intercourse, but simply took note of the Government's burden to prove "lack of consent" and contended that the Government could not do so beyond a reasonable doubt.

II. Discussion

The issue of whether a jury was properly instructed is a question of law, which we review de novo. *United States v. McDonald*, 57 M.J. 18, 20 (2002). Even if not requested by the defense, a military judge has a sua sponte duty to give certain instructions when reasonably raised by the evidence, including a defense instruction as to the affirmative mistake of fact defense. *See id.*; R.C.M. 920(e).

In the present case, the military judge concluded, as a matter of law, that there was insufficient evidence of a reasonable and honest belief to require a mistake of fact instruction. The Court of Criminal Appeals suggested there was some evidence that Appellant had an honest belief as to consent. The court observed, however, that it was "difficult ...to imagine any court members attaching any credit" to the evidence. *United States v. Hibbard*, No. ACM 34371, slip Op. at 5 (A.F. Ct. Crim. App. Nov. 29, 2001). The court concluded, as a matter of law, that there was insufficient evidence of a reasonable belief to require an instruction. Id. For the reasons set forth below, it is appropriate to focus on the point of agreement between the military judge and the Court of Criminal Appeals – that the evidence did not reasonably raise the issue of whether Appellant had a reasonable but mistaken belief as to consent. Because we conclude that the military judge did not err in this regard, we need not address aspects of the ruling by the military judge or the opinion by the court below citing other reasons for declining to give the instruction.

On appeal, Appellant suggests that the following factors support a mistake of fact instruction: (1) TSgt W willingly accepted Appellant's invitation to join him at night in a private swimming pool; (2) she accepted a foot rub from Appellant; (3) when Appellant engaged in sexual touching, she did not tell him that she wanted him to stop; (4) they

both got out of the tub and laid down on a towel and had sexual intercourse; (5) during intercourse, Appellant received "mixed signals" in the form of heavy breathing and crying; and (6) when he asked her after penetration if she wanted him to stop, he may not have perceived her first response, but when he asked again and she said "Yes" he stopped. In addition, as noted by the Court of Criminal Appeals, at the end of the incident appellant said, "Well, at least this was consensual." *Id.*

The test for determining whether an affirmative defense of mistake of fact defense has been raised is whether the record contains some evidence of an honest and reasonable mistake to which the members could have attached credit if they had so desired. R.C.M. 916(j); *Davis*, 53 M.J. at 205. In the present case, as noted above, our focus is limited to the "reasonable mistake" prong of the test. Therefore, in determining whether the factors cited by Appellant reasonably raised the defense of mistake of fact, we consider whether the record contains some evidence of a reasonable mistake to which the members could have attached credit if they had so desired. In doing so, we consider the totality of the circumstances at the time of the offense. Key circumstances in this case include: (1) the fact that Appellant had a supervisory relationship with TSGT W, and a responsibility to orient her to her new duty station; (2) his use of the official duty environment to press her to join him at the swimming pool that evening; (3) her manifest discomfort, as reflected in her repeated efforts to avoid his invitation to join him in the swimming pool, her unwillingness to enter his apartment, and her hesitancy to enter the pool until prodded by him; (4) his insistence that she respond to a question about trust as a predicate for giving her a foot rub; (5) his sudden rush at her, followed by aggressive sexual touching; (6) her statement that this put her in a state of shock; (7) the absence of any evidence that she

responded positively to his aggressive sexual touching; (8) her repeated attempts to avoid his kisses; and (9) his use of his body weight to restrict her upper body movements.

In our consideration of whether a mistake of fact instruction is required, we take into account the manner in which the issue was litigated as well as the material introduced into evidence at trial. *See, e.g., United States v. Peel*, 29 M.J. 235 (C.M.A. 1989).

As noted by the military judge in the present case, defense counsel concentrated throughout the trial on the theory that Appellant had not engaged in sexual intercourse with TSgt W. Defense counsel steadfastly adhered to the theory of no sexual intercourse in his opening statement, during his cross-examination of TSgt W, in the presentation of defense evidence, and in his closing argument.

With respect to cross-examination, defense counsel's approach to the prosecution's key witness, TSgt W, is informative – particularly because Appellant, at trial and on appeal, has relied on her testimony as the basis for the instruction. At best, TSGT W's testimony described a situation that the defense might have explored in greater detail to reasonably raise a mistake of fact. Such an approach, however, would have entailed an element of risk, because the cross-examination might have produced testimony that more firmly demonstrated an absence of consent. The fact that such an approach would have been risky, however, does not mean that the defense could leave the details unexplored and then expect to receive a mistake of fact instruction. Without such exploration, TSGT W's testimony did not describe a situation that reasonably raised a mistake of fact as to her willingness to engage in sexual intercourse.

In the present case, defense counsel made no attempt on cross-examination of TSgt W to explore and develop grounds for a mistake of fact. Instead, counsel used cross-examination to highlight inconsistencies and establish motive in an attempt to bolster his own theory that no sexual intercourse occurred. *See Jones*, 49 M.J. at 90.

Although it is not necessary to present evidence of a mistake of fact in the defense case on the merits or to discuss such evidence in closing argument in order to obtain an instruction in a proper case, *see, e.g., United States v. Sellers*, 33 M.J. 364, 368 (C.M.A. 1991), it is appropriate for an appellate court to take into account the absence of such a presentation in assessing the significance of the evidence. We note that TSgt W's testimony regarding Appellant's remark -- "Well, at least this was consensual" – was treated at trial as an isolated remark unconnected to specific evidence of Appellant's understanding or intent. Defense counsel did not seek to connect it to any other evidence at trial, nor did defense counsel seek through argument to suggest that the case involved sexual intercourse which Appellant believed to be consensual. Although the defense presentation at trial is not dispositive in determining what affirmative defenses have been reasonably raised by the evidence, we may take into account the absence of a mistake of fact approach from the defense case when considering evidence such as TSGT W's testimony about Appellant's parting remark. *See Taylor*, 26 M.J. at 131. In that context, Appellant's cursory parting remark -- that "at least" the act was consensual — need not be viewed as anything more than an after-the-fact attempt to recast unpleasant circumstances in a favorable light. *Cf. United States v. Buckley*, 35 M.J. 262 (C.M.A. 1992)(appellant's remark to victim that he thought she was awake did not raise mistake of fact as to consent).

In summary, the evidence cited by the defense in light of the totality of the circumstances, including the manner that

the issue was litigated at trial, was insufficient to reasonably raise the issue of whether Appellant had a reasonable belief that TSgt W consented to sexual intercourse.

III. Conclusion

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

APPENDIX B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES
v.
Chief Master Sergeant BOBBY HIBBARD
United States Air Force

ACM 34371

29 November 2001

Sentence adjudged 5 May 2000 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Michael J. Rollinger.

Approved sentence: Confinement for 2 years and reduction to E-4.

Appellate Counsel for Appellant: Colonel James R. Wise, Lieutenant Colonel Timothy W. Murphy, and Major Jeffrey A. Vires.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Major Lance B. Sigmon, Major Eric D. Placke, and Captain Christa S. Cothrel.

Before

YOUNG, BRESLIN, and HATTRUP
Appellate Military Judges

OPINION OF THE COURT

YOUNG, Chief Judge:

Court members convicted the appellant of maltreating, raping, and indecently assaulting Technical Sergeant (TSgt) W, being derelict in the performance of his duties by attempting to kiss Staff Sergeant (SSgt) S and TSgt K, and making a false official statement. Articles 93, 120, 134, 92, and 107, UCMJ, 10 U.S.C. §§ 893, 920, 934, 892, 907. The court members sentenced him to confinement for 4 years and reduction to E-4. The convening authority approved the reduction, but reduced the period of confinement to 2 years. The appellant's counsel assign three errors: (1) The military judge refused to give the defense requested mistake of fact instruction as to the rape and indecent assault specifications; (2) The military judge erred by instructing the members the maximum sentence to confinement was life without parole; and (3) The staff judge advocate (SJA) was disqualified from acting on the case. In addition, the appellant has raised several issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We affirm.

I. Mistake of Fact Instruction

Prior to argument on findings, the trial defense counsel asked the military judge to give a mistake of fact instruction with regard to the specifications alleging the appellant raped and committed an indecent assault on TSgt W. The military judge refused. Although he recognized that the appellant did not have to testify to raise the issue, the military judge found no evidence to which the members could attach credit that the appellant honestly believed that she consented to sexual intercourse. He also believed that, in light of the defense's utter rejection of the notion that the appellant had sex with TSgt W, such an instruction would confuse the members.

A. Facts

The appellant was the first sergeant for the 320th Air Expeditionary Group, Eskan Village, Kingdom of Saudi Arabia. TSgt W was assigned to work in the Group command section. When TSgt W arrived at the installation, the appellant took an immediate interest in her. Despite the fact that she had a sponsor, he volunteered to show her around the base. After the tour, the appellant told TSgt W that he would pick her up for dinner at her villa and show her where the dining facility was located. Instead, he took her to a party hailing recent arrivals and bidding farewell to those departing the installation. The following day, the appellant invited TSgt W to an ice cream social held at the base chapel. After the social, he showed her more of the base and asked her if she was having marital problems. The appellant showed her a swimming pool to which he claimed he had special access. He told TSgt W that if she went to the main pool the men there would "hit on her," whereas, if she hung around him, no one would bother her because he was "the Chief."

On several occasions the following day, the appellant called TSgt W into his office. He wanted to take her to the special pool, but she kept stating that she was not sure if she would go with him. She eventually agreed to go. The appellant also showed TSgt W pictures of his new house in the United States and suggested that his wife might not be moving in with him.

That night, about 2030, when it was dark, the appellant and TSgt W went to the pool. After swimming around for 15-20 minutes, they went into the hot tub. From the hot tub they returned to the pool and then back into the hot tub. They talked mostly about their families. TSgt W began to feel relaxed and thought she would finally be able to sleep

through the night—she had not slept well since her arrival. The appellant asked her if she trusted him. She said she did. He then picked up her feet and began to rub them. A few seconds later, apparently without any warning, the appellant stood up, rushed TSgt W, and touched her breasts, buttocks, thighs, and back. He tried to kiss her, but she avoided him. He then pulled aside her swimsuit and inserted a finger into her vagina. The appellant then got out of the hot tub and laid a towel on the ground. TSgt W said, "I can't do this," although she could not remember if she said it out loud. The "next thing [TSgt W] knew [she] was laying on [her] back on the ground."

TSgt W does not remember how she got from the hot tub to the towel, but she remembers the appellant straddling her with his knees, pulling down his swim trunks, and laying his full body weight on top of her so she could only move her upper body and head. The appellant tried to kiss her, but she was able to move her head from side-to-side far enough to avoid his lips. He told her, "Come on, kiss me," but she continued to move her head so that he could not do so. She was crying and having a hard time breathing because of the appellant's weight. The appellant moved her swimsuit aside and inserted his penis into her vagina. TSgt W continued to cry and the appellant eventually asked her if she wanted him to stop. She nodded her head "yes," but was unsure whether he saw her. Despite the continued crying, the appellant did not stop. Some time later he again asked if she wanted him to stop. TSgt W whimpered that she did and the appellant stopped.

After he stopped, the appellant asked TSgt W to go to his room. She said she could not. He told her that the next time it happened, she should just let "what comes naturally happen." TSgt W continued to cry. The appellant told her that she did not have anything to worry about because he had

had a vasectomy. He then said, "Well, at least this was consensual." As they left the pool to return to their villas, the appellant said, "You are a beautiful woman and we are both adults."

The area surrounding the pool was flanked by villas. At some time while the appellant and TSgt W were at the pool, someone walked by the pool area outside the gate on the sidewalk. The appellant exchanged a greeting and a wave with him. TSgt W also observed a man turn the light on in a room in one of the villas.

TSgt W did not report the incident for three days—until SSgt S questioned her about her distraught condition. A rape protocol was performed, evidence was seized from the appellant's villa, and DNA tests were performed. However, except for a small bruise on TSgt W's arm and a mild inflammation of her vaginal wall that could not be attributed to an infection, no corroborative evidence was discovered. When the appellant was interviewed about the offenses, he denied any sexual contact with TSgt W.

B. The Law

The offense of rape under Article 120(a), UCMJ, is a general-intent offense requiring proof that the accused deliberately or purposefully had sexual intercourse with the victim by force and without her consent. *United States v. Willis*, 41 M.J. 435, 437 (1995). An honest and reasonable mistake on the part of the accused as to the consent of the victim is a valid defense to rape. *Id.*

A military judge is required to appropriately instruct the court members on special, or affirmative, defenses "reasonably raised by the evidence." *United States v. McDivitt*, 41 M.J. 442, 443 (1995) (quoting *United States v.*

Tatum, 36 M.J. 302, 304 (C.M.A. 1993)). *Accord United States v. Davis*, 53 M.J. 202, 205 (2000). A defense is reasonably raised if there is "some evidence to which the military jury may attach credit if it so desires." *United States v. McMonagle*, 38 M.J. 53, 58 (C.M.A. 1993). "Any doubt whether an instruction should be given should be resolved in favor of the accused." *Davis*, 53 M.J. at 205. *See* Rule for Courts-Martial (R.C.M.) 920(e), Discussion.

C. Discussion

The defense was in a difficult position at trial. The appellant was charged with both rape and making a false official statement to law enforcement agents by denying "any sexual contact with" TSgt W. He could not very well advance a mistake of fact defense to the rape without conceding that his statement to law enforcement agents was false. The appellant never testified. In both the opening statement and the closing argument, the trial defense counsel argued that the evidence was insufficient to convict because of inconsistencies in the evidence, the improbability of the victim's story, and the fact that the appellant was a truthful and honorable man. He insisted that to have sexual intercourse in such a public place under the circumstances of the case was stupid and that the appellant was certainly not a stupid man. Although the defense counsel never conceded that the appellant had any sexual contact with TSgt W, he, nevertheless, requested a mistake of fact instruction.

The appellant was not entitled to a mistake of fact instruction unless it was reasonably raised by the evidence. There is no requirement that an accused must testify in order raise this defense. *See United States v. Jones*, 49 M.J. 85, 91 (1998). "A defense may be raised by evidence presented by the defense, the prosecution, or the court-martial." *United States v. Taylor*, 26 M.J. 127, 131 (C.M.A. 1988). However,

the defense is not raised unless there is some evidence (1) of objective circumstances upon which a reasonable person might rely to infer consent, and (2) the appellant actually or subjectively inferred consent based on these circumstances. *See Willis*, 41 M.J. at 438.

The military judge denied the requested instruction. It appears the basis for his decision was that such an instruction, under the circumstances, would be confusing to the court members—the appellant had denied sexual contact with TSgt W when interviewed and the appellant's counsel was arguing that sexual contact never occurred—and because there was no evidence the appellant honestly believed TSgt W was consenting.

We find there was some evidence from which court members could attach credit, if they desired, that the appellant honestly believed the sexual contact with TSgt W was consensual. After the intercourse, the appellant asked TSgt W to accompany him back to his room and said, "Well, at least this was consensual." Although it is difficult for us to imagine any court members attaching any credit to this statement under the circumstances, they could do so, if they desired. However, there is no evidence of objective circumstances from which reasonable court members could infer that TSgt W consented to either the indecent assault or the rape. No reasonable court member would conclude that permitting the appellant to rub her feet was a green light for the appellant to touch her breasts, thighs, and buttocks, and to penetrate her vagina with his finger while she was avoiding his kisses. No reasonable court member would conclude that a crying woman who is trying to avoid being kissed is signaling her consent to sexual intercourse. The evidence did not raise the mistake of fact defense.

II. Sentencing Instruction

Without objection, the military judge advised the court members that the maximum sentence to confinement was life without eligibility for parole. The appellant contends this was error.

A court-martial may adjudge a sentence of confinement for life without eligibility for parole in any case in which confinement for life may be adjudged. Article 56a, UCMJ, 10 U.S.C. § 856a. However, a court-martial may not adjudge a sentence that exceeds "such limits as the President may prescribe for the offense." Article 56, UCMJ. The appellant contends that life without the eligibility for parole is not an authorized punishment for rape until the President specifically adopts it.

At the time the appellant was convicted, the President had set the maximum punishment for rape as "[d]eath or such other punishment as a court-martial may direct." *Manual for Courts-Martial, United States*, Part IV, ¶ 45(e)(1) (1998 ed.). Life without eligibility for parole is a lesser sentence than death. Although the case was referred to a court that was not authorized to adjudge death, neither the President nor the convening authority limited the sentence to life imprisonment with the possibility of parole. Therefore, the military judge was correct in holding that life without parole was an authorized punishment for rape.

Regardless, the appellant failed to demonstrate any prejudice. Article 59(a), UCMJ, 10 U.S.C. § 859(a). The trial counsel argued for confinement for 10 years, the court members adjudged 4 years, and the convening authority reduced it to 2 years.

III. The Staff Judge Advocate

The appellant asserts that the SJA "should have recused himself" from preparing the staff judge advocate's recommendation (SJAR) because of his partiality. Specifically, the appellant alleges as follows: (1) Prior to the preferral of charges, the SJA told the appellant's commander that he thought the appellant was guilty; and (2) In his addendum to the SJAR, the SJA incorrectly claimed the trial defense counsel did not attach recordings of the trial proceedings to his clemency matters.

Before the convening authority can act on the findings and sentence of a general court-martial or a special court-martial which adjudged a bad-conduct discharge, the convening authority must obtain the written recommendation of his staff judge advocate. Article 60(d), UCMJ, 10 U.S.C. § 860(d).

> No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing authority upon the same case.

Article 6(c), UCMJ, 10 U.S.C. § 806(c). The purpose of this provision is to "assure the accused a thoroughly fair and impartial review" *United States v. Coulter*, 14 C.M.R. 75, 77 (C.M.A. 1954). An SJA is also disqualified if he has "other than an official interest" in the case. *United States v. Sorrell*, 47 M.J. 432, 433 (1998). The phrase "'other than an official interest' means a personal interest or feeling in the outcome of a particular case." *Id.* (citing *United States v. Rice*, 33 M.J. 451 (C.M.A. 1991)). The appellant has the burden of establishing a prima facie case against the SJA. *United States v. Wansley*, 46 M.J. 335, 337 (1997).

The only evidence the appellant musters in support of his first contention is an unsworn letter from his commander that was part of the appellant's clemency submission. In the letter, the commander alleges that the SJA told her before the Article 32 hearing that he thought the appellant was guilty. The commander's letter does not fully explain the context in which the SJA made his comments. However, we note that this commander's objectivity is open to question. In the letter she submitted, she appears to attribute her mother's recovery from two serious illnesses to the appellant's intercession—he convinced two church congregations to pray for her mother's speedy recovery.

A convening authority functions in different ways. "In referring a case to trial, a convening authority is functioning in a prosecutorial role. In stark contrast, when he is performing his post-trial duties, his role is similar to that of a judicial officer." *See United States v. Fernandez*, 24 M.J. 77, 78 (C.M.A. 1987) (citations omitted). Likewise, the SJA functions in several different capacities.

The SJA is the chief legal officer for the command and primary legal advisor to the convening authority. He must tailor his advice to the function being performed by the person he is advising. At times, the SJA advises officials functioning in an investigative or prosecutorial capacity: e.g., when he advises law enforcement officials on whether they have sufficient evidence to seek a search authorization or warrant; when he advises a commander on whether the evidence is sufficient to bring a case to trial and which charges to prefer; when he advises the convening authority on the appropriateness of referring a case to trial and the appropriate forum to hear the charges; and when he supervises the personnel who will prosecute the case in court. At other times, he advises officials functioning in more of a judicial capacity:

e.g., when advising the convening authority on the results of a trial, and recommending an appropriate action.

The appellant failed to establish a prima facie case that the SJA was disqualified. We find nothing strange or inappropriate about the SJA advising a commander that the evidence is sufficient to establish an accused's guilt. The appellant failed to establish that the SJA's comments demonstrated a personal interest or bias against him.

The appellant's second contention is that the SJA was disqualified because of his material dispute with the defense counsel, over whether copies of the tapes recording the court-martial proceedings were attached to the defense response to the SJAR. This is not a material dispute that demonstrates a bias on the part of the SJA against the appellant. Although the tapes may have been attached when the defense counsel submitted the response to the staff judge advocate's recommendation, they may not have been attached when the SJA reviewed them. Regardless, the convening authority was provided with a copy of the recordings from the appellant's court-martial. However, we note that the recordings were not attached to the record of trial when it arrived at this Court. Although on appeal no issue was raised as to the fairness of the military judge, the tapes still should have accompanied the record of trial.

IV. Conclusion

We have considered the errors personally assigned by the appellant pursuant to *Grostefon* and find them to be without merit.

The findings are correct in law and fact, and no error prejudicial to the appellant's substantial rights occurred. The record is returned to The Judge Advocate General for inclusion

of the tapes with the record of trial. The case need not be returned to this Court unless further review is required. The findings and sentence are

AFFIRMED.